

P.E.R.C. NO. 2006-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGENFIELD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2006-044

BERGENFIELD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Bergenfield Board of Education for a restraint of binding arbitration of a grievance filed by the Bergenfield Education Association. The grievance contests the withholding of a teaching staff member's increment. The Commission concludes that among the reasons proffered for this withholding, the non-teaching performance concerns predominated in the withholding decision. Those reasons included alleged failure to report to assigned classes and sleeping in class.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Fogarty & Hara, attorneys
(Stephen R. Fogarty, of counsel and on the brief;
Janet L. Parmelee, on the brief)

For the Respondent, Springstead & Maurice, attorneys,
(Harold N. Springstead, on the brief)

DECISION

On December 6, 2005, the Bergenfield Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Bergenfield Education Association. The grievance contests the withholding of a teaching staff member's increment.

The parties have filed briefs and exhibits. These facts appear.

The Association represents certified teaching personnel, custodians, secretaries, bus drivers and certain other personnel. The parties' collective negotiations agreement is effective from

July 1, 2003 through June 30, 2006. The grievance procedure ends in binding arbitration.

Anna Kovalcik has been employed as a teacher by the Board since 1987. Kovalcik teaches basic skills in the morning at the Lincoln School and in the afternoon at the Jefferson School. She provides in-class support to elementary school students during instruction by their regular classroom teachers and also works with small groups of students who are "pulled-out" of their classrooms.

On April 15, 2005, the superintendent notified Kovalcik that he intended to recommend to the Board that her employment and adjustment increments be withheld for the 2005-2006 school year based on the performance deficiencies set forth in eleven documents: her April 2005 evaluation; three reports concerning incidents that took place on December 22, 2004; and seven memoranda issued between 2001 through 2005 detailing administrators' concerns about Kovalcik's absences from her assigned classes or adherence to her schedule. The record does not include a statement of reasons from the Board pursuant to N.J.S.A. 18A:29-14.

On May 24, 2005, the Association filed a grievance asserting that the withholding was without just cause. The superintendent and the Board denied the grievance. The Board stated that it did so for the reasons set forth in the evaluative documents, which

included poor use of instructional techniques, lack of classroom discipline, poor communication with parents, excessive absenteeism, unexcused absences, sleeping in class, and failure to attend professional development activities.^{1/} On September 19, the Association demanded arbitration. This petition ensued.

In three memoranda dated December 10, December 13, and December 20, 2001, Principal John Alfieri wrote to Kovalcik reminding her to follow her schedule and to advise him in advance if conflicts arose. The December 20 document noted that Kovalcik signed out of school to go to the bank during a fifteen-minute period when she was assigned to work with students.

A January 17, 2002 memorandum from Alfieri raised similar concerns. Alfieri noted that Kovalcik had twice been outside of the building when she should have been in a class for in-class support.

In a March 17, 2003 memorandum to Kovalcik, Joseph Miceli, principal of the Jefferson School, expressed his concerns with Kovalcik's conduct on March 6. On that date, Kovalcik left the Lincoln School at 11:20 a.m. but did not attend her afternoon

1/ The basis for the last reason is not clear. Kovalcik's evaluation stated that she had completed the professional development requirement of 100 hours and had attended one of the district's two in-service activities. It added that there was no evidence that she had used her newly acquired knowledge in her instruction and she was urged to do so. The Board does not focus on this reason and it does not figure in our analysis.

session at Jefferson. The memorandum recounted that Kovalcik had called the Jefferson secretary and told her that, after leaving Lincoln, she had been in a car accident and could not return to work. However, Miceli stated that he could not reach Kovalcik by telephone that afternoon and that, contrary to his direction to her on March 7, she had not provided adequate documentation of the incident. He stated that the handwritten note she submitted on March 10 was insufficient to excuse her from her duties. In the note, Kovalcik stated that she drove home because she was "really shook up" after her car had been struck in the rear.

On October 20, 2004, Miceli wrote to Kovalcik concerning an unexcused absence on October 15. Miceli stated that Kovalcik was not in the assigned class from 1:45 p.m. to 2:30 p.m. and did not respond to two calls over the public address system. Miceli wrote that he believed that she had left the building without contacting the office. He stated that in "response to the series of incidents and conferences to address this issue I am recommending disciplinary action be taken by the district." The record does not indicate if any discipline was imposed at that time.

A December 23, 2004 memorandum to T. Egan from H. Beattie^{2/}, describes three related incidents on December 22. On

^{2/} The record does not indicate the positions of these individuals, although we presume they are school

(continued...)

that date, a teacher was walking by a classroom where Kovalcik was assigned to provide basic skills instruction to kindergarten students. The teacher heard a commotion, entered the room, and saw three students running around the room and climbing on furniture. Kovalcik was sleeping at a table. The teacher sent the students back to their classroom and tried to wake Kovalcik but was unable to do so. She summoned the principal who was also unable to wake Kovalcik. He directed the school secretary to summon Kovalcik over the public address system. Kovalcik reported to the office and stated she was sorry and assured the principal that she was capable of continuing with her duties.

A parent's December 23, 2004 incident report described a similar situation later in the day on December 22. The parent stated that while visiting a 4th grade classroom, she observed that Kovalcik repeatedly fell asleep while students were giving oral reports. When her head would go too far back, she would awaken and then fall asleep again. The parent wrote that her son had told her more than once that Kovalcik sleeps in class, sometimes to the point of snoring.

Finally, a January 4, 2005 memorandum from Alfieri to Kovalcik recounted his observations and interactions with her on December 22, 2004. Alfieri stated that he observed Kovalcik

2/ (...continued)
administrators.

sleeping during a sing-along activity. When he approached her and asked if she was okay, she responded that she felt dizzy. Alfieri accompanied Kovalcik to the nurse to have her blood pressure checked, which was low/normal. Kovalcik stated that she had not slept the night before but that she was okay and wanted to finish the day. Kovalcik added that she was worried about an MRI scheduled for the end of December. Alfieri's memorandum advised that the incident caused him to be greatly concerned about student safety and Kovalcik's ability to fulfill her duties. He recommended that Kovalcik seek the aid offered by REAP and he explained the program to her. The record does not indicate what REAP is or what it provides.

A March 17, 2005 memorandum from Alfieri to Kovalcik admonished her for not reporting to her assigned classroom. It stated, in part:

At 9:35 a.m., three fifth grade students came to the office looking for you. I called the first grade classrooms to see if you were there. However, you were not. Since testing was going on, I could not make an announcement for you over the public address system, and I began to search the building. I found you on the bottom floor and asked why you were not with your fifth grade students. You indicated that you had spoken to the fifth grade teachers today and they indicated to you that since you did not have a room you did not have to see the students. You further indicated that you were at the nurse's office to get a band aid and that you would now go to the fifth grade classes. A check with the nurse indicated that you had not been there at least within the past

twenty-five minutes (9:15 a.m. to 9:40 a.m.), and a check with the fifth grade teachers indicated you had not spoken with them since Monday, March 14, 2005.

While I realize that testing has presented problems in meeting students in your room, I have indicated to you on several occasions that you should be in the classrooms doing in class support or using the library if available.

Your actions, at this time, appear to be insubordinate, a blatant disregard of my instructions. The loss of valuable instruction time for students who need the help you may provide furthers my concern for your overall performance of your duties.

In her 2005 annual evaluation, Kovalcik was cited as showing "insufficient improvement" in several areas including: collaboration with classroom teachers; student assessment; questioning techniques; cooperative group and student participation; instruction -- especially in the in-class support sessions; educational materials and technology; discipline; routine procedures; community relations; attendance; punctuality and scheduling; classroom space; professional development; PIP completion; and parent relations. The evaluation stated that these issues had been noted in previous evaluations and that there had been insufficient improvement.

The attendance section of the evaluation noted that Kovalcik had used 42 sick days, including 34 days for an extended medical leave that she agreed to take due to the incidents in December, and that the absences caused an impact on her students since

adequate substitute coverage was not always available. The memoranda pertaining to that incident were attached to the evaluation. The evaluation concluded with a recommendation that Kovalcik's increment be withheld for the 2005-2006 school year. It added that if she did not improve, she could be subject either to another withholding or other action.

Under N.J.S.A. 34:13A-26 et seq., all increment withholdings of teaching staff members may be submitted to binding arbitration except those based predominately on the evaluation of teaching performance. Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996). Under N.J.S.A. 34:13A-27d, if the reason for a withholding is related predominately to the evaluation of teaching performance, any appeal shall be filed with the Commissioner of Education.

If there is a dispute over whether the reason for a withholding is predominately disciplinary, as defined by N.J.S.A. 34:13A-22, or related predominately to the evaluation of teaching performance, we must make that determination. N.J.S.A. 34:13A-27a. Our power is limited to determining the appropriate forum for resolving a withholding dispute. We do not and cannot consider whether a withholding was with or without just cause.

In Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991), we articulated our approach to determining the appropriate forum. We stated:

The fact that an increment withholding is disciplinary does not guarantee arbitral review. Nor does the fact that a teacher's action may affect students automatically preclude arbitral review. Most everything a teacher does has some effect, direct or indirect, on students. But according to the Sponsor's Statement and the Assembly Labor Committee's Statement to the amendments, only the "withholding of a teaching staff member's increment based on the actual teaching performance would still be appealable to the Commissioner of Education." As in Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd [NJPER Supp.2d 183 (¶161 App. Div. 1987)], we will review the facts of each case. We will then balance the competing factors and determine if the withholding predominately involves an evaluation of teaching performance. If not, then the disciplinary aspects of the withholding predominate and we will not restrain binding arbitration. [17 NJPER at 146]

The Board argues that the Commissioner of Education must review this withholding because it was the result of its evaluation of Kovalcik over four years, during which time administrators recorded their concerns about her poor instruction, inadequate classroom management, and inappropriate classroom conduct. It maintains that such concerns have consistently been held to be predominately related to an evaluation of teaching performance. It views the incidents where Kovalcik was charged with sleeping in class as examples of poor

classroom supervision and points out that Kovalcik's repeatedly leaving the building resulted in students missing their basic skills classes.

The Association counters that this withholding is analogous to withholdings based on excessive absenteeism, non-classroom interaction with parents or students, or violations of administrative procedures, all of which are not based on an evaluation of teaching performance. It contends that, aside from certain evaluations, the documents dating back to 2001 do not relate to teaching performance. It maintains that the withholding was without just cause because the Board did not consider Kovalcik's illness or the fact that she underwent treatment during an extended sick leave.^{3/}

The Board rejects the Association's argument that Kovalcik's teaching deficiencies were related to her medical condition. The Board points out that after her medical leave of absence in March of 2005, Kovalcik failed to report to another classroom assignment.

We start by noting that, while the Board has not submitted an official statement of reasons for the withholding, Kovalcik's

^{3/} The Association has also submitted an October 4, 2005 observation that it contends shows that Kovalcik's performance and medical health have improved. We agree with the Board that the observation is irrelevant to its decision six months' earlier to withhold Kovalcik's increment.

increment was indisputably withheld for the reasons set forth in the documents listed in the superintendent's May 3, 2005 letter, which were in turn summarized in the Board's July 29 letter.

While some of these reasons unquestionably center on the evaluation of teaching performance, several others do not. We conclude that the non-performance reasons appear to have weighed more heavily than the teaching performance reasons in the decision to withhold the increment. Therefore, we find that this withholding is not predominantly related to an evaluation of teaching performance and may be reviewed by an arbitrator, who must consider both the performance and non-performance reasons for the withholding. See Orange Tp. Bd. of Ed., P.E.R.C. No. 2005-65, 31 NJPER 118 (¶50 2005) (in mixed case, we must determine whether performance or non-performance reasons predominate). We detail the reasons that lead to this conclusion and start with an assessment as to which of the stated reasons are teaching performance-related and which are not.

The reasons for this withholding fall into four categories: (1) the series of incidents where Kovalcik allegedly did not fulfill her instructional duties when she did not report to her assigned class, sometimes because she had left her school; (2) other incidents, not involving her absence from class, when Kovalcik allegedly did not follow her schedule; (3) the December 22, 2004 incidents where Kovalcik was observed sleeping in class

and at a sing-along activity; (4) and the variety of concerns detailed in the April 2005 evaluation.

The first category of reasons falls within the ambit of cases finding that withholdings based on excessive absenteeism or other allegations of non-performance are disciplinary. In Edison, we and the Court reasoned that a withholding based on a board's contention that a staff member was excessively absent does not generally involve an evaluation of teaching performance, but rather flows from the teacher's alleged failure to perform at all because of his or her absences. See also Scotch Plains (noting that, unlike withholdings involving instructional techniques or classroom conduct, no educational expertise is needed to review allegations of excessive absenteeism); Hackettstown Bd. of Ed., P.E.R.C. No. 2003-48, 29 NJPER 22 (¶6 2003) (arbitrator could consider withholding based on staff member's insubordinate refusal to perform school nurse duties); cf. Orange Tp. (teacher's alleged refusal to report to assignment was insubordination, not a performance deficiency, although withholding was based predominately on other, teaching performance reasons).

The foregoing analysis pertains to the allegations that Kovalcik did not fulfill her responsibilities when she did not report as required to provide basic skills instruction. Such allegations do not constitute an evaluation of teaching

performance, because such performance did not occur. Compare Edison, 304 N.J. Super. at 467 (withholding based on long-term medical leave of absence not based on performance because there was "no performance to evaluate").^{4/}

Dennis Tp. Bd. of Ed., P.E.R.C. No. 98-50, 23 NJPER 605 (¶28297 1997), relied on by the Board, does not warrant a different conclusion. In that case, we held that the two stated reasons for a withholding - inability to control students and the teacher's consistent absence from her classroom while school was in session - were predominately related to an evaluation of teaching performance. The record in Dennis included observation reports and evaluations about the teacher's classroom management; there was no context or explanation for the "absence from class" reason; and our opinion mentioned but did not further discuss it. Further, the Association viewed the withholding as one based on alleged problems with student discipline. In this posture, we are not persuaded that Dennis is more apt than the cited cases concerning absences and non-performance.

^{4/} This language reflects the focus of the Court's analysis, although the Board highlights the Court's observation that there were no evaluations in Edison and no reports that the absences had negatively affected students. In any case, the assessment of whether Kovalcik's alleged failure to report to her assignments is a teaching performance reason is not affected by the fact that this reason was noted in her evaluations, along with several other alleged problems.

We also find that the second category of reasons is not predominately related to an evaluation of teaching performance. Contentions that Kovalcik did not follow her schedule or sign out properly are not related to classroom conduct or educational interactions. They do not require educational expertise to evaluate and they are similar to misconduct allegations that we have found to be disciplinary. See Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997) (withholding based on chronic tardiness predominantly disciplinary); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) (withholding predominantly disciplinary where based on allegations that teacher left work early, falsified sign-out sheet, repeatedly missed back-to-school night, and was insubordinate).

With respect to the third set of reasons, those pertaining to the December 22, 2004 incidents, we also conclude that they do not relate to an evaluation of teaching performance. As the Board notes, we have repeatedly restrained arbitration of withholdings based on allegations of poor classroom management or inappropriate classroom conduct. See, e.g., Readington Tp. Bd. of Ed., P.E.R.C. No. 2006-5, 31 NJPER 242 (¶93 2005) (teacher yelled and used inappropriate language; had erratic and unstable demeanor; and threatened to use force); Knowlton Tp. Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003) (allegations that a teacher humiliated students); Northern Highlands Reg. Bd. of Ed.,

P.E.R.C. No. 2003-49, 29 NJPER 24 (¶7 2003) (alleged difficulty in relating to female students, as well as allegedly inappropriate demeanor with the entire class). We reasoned that these withholdings involved subjective educational judgments about the type of interactions or conduct that is appropriate in a classroom. Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005).

However, the December 2004 and January 2005 documents detail concerns that center on Kovalcik's non-performance when she was asleep while on duty, apparently due to illness. They do not involve a subjective assessment of the nature of Kovalcik's student interactions or classroom management. Stated another way, no educational expertise is required to determine that a teacher should not sleep in class. Compare Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (withholding for failure to follow directive not to leave students unattended was not based on evaluation of teaching performance); Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) (where teacher denied corporal punishment allegations, arbitrator could objectively determine whether the teacher had engaged in indisputably improper conduct). While the incidents occurred in a classroom, not every in-class event involves teaching performance. See Demarest Bd. of Ed., P.E.R.C. No. 99-36, 24 NJPER 514, 517 (¶29239 1998),

aff'd 26 NJPER 113 (¶31046 App. Div. 2000) (teacher's allegedly misinformed response to student query about why class had been moved was not curriculum-based and did not involve teaching). It appears that the focus of examination on this issue will be Kovalcik's medical condition on this day, a question that an arbitrator can competently examine.

Finally, with respect to the fourth category of reasons, those detailed in the April 2005 evaluation, we agree with the Board that many of the problems noted involve an evaluation of teaching performance. The concerns about instructional techniques; collaboration with the classroom teacher; student assessment; and use of educational materials, for example, all center on core teaching performance issues. South Harrison Bd. of Ed., P.E.R.C. No. 96-36, 22 NJPER 20 (¶27007 1995); Wood-Ridge Bd. of Ed., P.E.R.C. No. 98-41, 23 NJPER 564 (¶28281 1997). However, the evaluation also cites the non-teaching performance concerns detailed in the other documents listed in the superintendent's letter - e.g., punctuality, scheduling and attendance. The December 2004 incidents are discussed under the "attendance" section of the evaluation, and the memoranda documenting the incidents are attached to the performance appraisal. In sum, the evaluation includes both performance and non-performance concerns.

Against this backdrop, we find that, overall, the Board's non-teaching performance concerns predominated in its withholding decision. Ten of the eleven documents listed in the superintendent's May 2005 letter addressed what we have found to be non-performance reasons. While the eleventh document, the 2005 evaluation, discusses several teaching performance allegations, the appraisal also addresses Kovalcik's alleged problems with adhering to her schedule and reporting for assignments. As noted earlier, the sleeping in class incidents figure prominently in the appraisal.

In terms of the weight given to the various reasons, the emphatic tone of the memoranda describing the events of December 22, 2004 makes clear that the administration viewed those circumstances with alarm, and we infer that the day's incidents were given significant weight in the withholding decision. Similarly, the strong tone of the October 2004 and March 2005 memoranda addressing Kovalcik's alleged failure to appear for scheduled assignments also reflects the administration's mounting concern with this issue, and we surmise that this non-teaching performance reason was also central to the withholding decision. All of these incidents occurred during the 2004-2005 school year, when the Board took action, and thus evidence the Board's heightened concern, vis-a-vis prior years, about whether Kovalcik should receive an increment. Indeed, the Board's brief

emphasizes these alleged problems during the 2004-2005 school year, although it views them as related to the evaluation of teaching performance.

By contrast, the description of the teaching performance concerns in the 2005 evaluation acknowledges some improvement, albeit insufficient, in virtually all of the noted areas. While it is possible that the increment might have been withheld based on the teaching deficiencies alone, we conclude that, among the multiple and varied reasons for this withholding, the non-performance reasons predominate. The most strongly expressed concerns center on non-performance reasons and, by comparison, the instructional problems are more mildly described. We therefore hold that the withholding is not predominately based on an evaluation of teaching performance and must be reviewed by an arbitrator. We stress that the arbitrator must consider both the performance and non-performance reasons for the withholding.

ORDER

The request of the Bergenfield Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed.

ISSUED: March 30, 2006

Trenton, New Jersey